

1 NATURAL RESOURCES AND ENVIRONMENTAL PROTECTION CABINET

2 Department for Environmental Protection

3 Division of Water

4 (New Administrative Regulation)

5 401 KAR 5:072E. Concentrated Animal Feeding Operations.

6 RELATES TO: KRS 224.10-100, 224.16-050, 224.16-060, 224.20-100, 224.20-110,
7 224.20-120, 224.70-100, 224.70-110, 33 U.S.C. 1342

8 STATUTORY AUTHORITY: KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110,
9 33 U.S.C. 1342

10 NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.10-100 authorizes the
11 Natural Resources and Environmental Protection Cabinet to issue, continue in effect, revoke,
12 modify, suspend or deny under such conditions as the cabinet may prescribe permits to discharge
13 into any waters of the Commonwealth. KRS 224.16-050 further empowers the cabinet to issue
14 federal permits pursuant to 33 U.S.C. Section 1342(b) of the Federal Water Pollution Control
15 Act. KRS 224.20-110 authorizes the cabinet to regulate the emission or discharge of air
16 contaminants into the air under the jurisdiction of the Commonwealth. This administrative
17 regulation establishes certain conditions applicable to KPDES permits for concentrated animal
18 feeding operations.

19 Section 1. Applicability. This administrative regulation applies to concentrated animal
20 feeding operations.

21 Section 2. Owner and Operator Liability.

(1) All persons who own or operate a concentrated animal feeding operation shall sign an application for and obtain a KPDES permit. This includes a person who enters into a contract with an owner or operator of a concentrated animal feeding operation if the person:

(a) Owns the animals;

(b) Directs the manner in which the animals will be housed or fed; or

(c) Controls the inputs or other material aspects of the concentrated animal feeding operation.

(2) All owners and operators of a concentrated animal feeding operation shall be jointly and severally liable for complying with the KPDES permit.

Section 3. Siting Criteria.

(1) A livestock barn, poultry house, lagoon, or land application area constructed or expanded after the effective date of this administrative regulation shall not be located in:

(a) A state or national park, state or national forest, or nature preserve; or

(b) A wellhead protection area approved by the cabinet pursuant to 401 KAR 4:220.

(2) A livestock barn, poultry house, or lagoon constructed or expanded after the effective date of this administrative regulation shall not be located in:

(a) A 100-year floodplain unless permitted pursuant to 401 KAR 4:060;

(b) A jurisdictional wetland as determined by the Natural Resources Conservation Service; or

(c) A sinkhole or other enclosed depression where subsidence is evident.

(3) The setback requirements established by this subsection apply as follows:

(a) A barn, lagoon, poultry house, litter storage structure, composting site, or waste handling structure constructed or expanded after the effective date of this administrative regulation at a concentrated animal feeding operation;

(b) A barn, lagoon, poultry house, litter storage structure, or composting site constructed or expanded after the effective date of this administrative regulation at an animal feeding operation, if the construction or expansion will cause the animal feeding operation to become a concentrated animal feeding operation; and

(c) Land application of waste at a concentrated animal feeding operation.

BEEF SITING CRITERIA

SETBACK FEATURE ³	BARN, LAGOON	LAND APPLICATION AREA	
		Injection	Other Method
Dwelling not owned by applicant, church, school, schoolyard, business, other structure to which the general public has access, park ⁴	1,500 feet	500 feet	1,000 feet
Incorporated city limit ^{4,5}	3,000 feet	1,000 feet	2,000 feet
Lake, river, blue-line stream, karst feature	150 feet	75 feet	150 feet
Water well not owned by applicant ⁴	300 feet	150 feet	150 feet
Downstream ¹ water listed in 401 KAR 5:030 as exceptional water or outstanding national resource water; or outstanding state resource water ²	1 mile	750 feet	1,500 feet
Downstream ¹ public water supply surface water intake	5 miles	1 mile	1 mile
Roadways, primary (state and Federal)	150 feet	75 feet	150 feet
Roadways, secondary (county)	150 feet	75 feet	150 feet

¹Measured along gradient

²Designated outstanding state resource waters are listed in 401 KAR 5:026

³Measured from the edge of the barn, lagoon, or land application area to the nearest edge of the setback feature

⁴Existing at the time the first KPDES permit is issued

⁵For existing operations, land application setbacks do not apply

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DAIRY SITING CRITERIA

SETBACK FEATURE ₃	BARN, LAGOON	LAND APPLICATION AREA	
		Injection	Other Method
Dwelling not owned by applicant, church, school, schoolyard, business, other structure to which the general public has access, park ₄	1,500 feet	500 feet	1,000 feet
Incorporated city limit _{4,5}	3,000 feet	1,000 feet	2,000 feet
Lake, river, blue-line stream, karst feature	150 feet	75 feet	150 feet
Water well not owned by applicant ₄	300 feet	150 feet	150 feet
Downstream ₁ water listed in 401 KAR 5:030 as exceptional water or outstanding national resource water; or outstanding state resource water ₂	1 mile	750 feet	1,500 feet
Downstream ₁ public water supply surface water intake	5 miles	1 mile	1 mile
Roadways, primary (state and Federal)	150 feet	75 feet	150 feet
Roadways, secondary (county)	150 feet	75 feet	150 feet

2 ₁Measured along gradient3 ₂Designated outstanding state resource waters are listed in 401 KAR 5:0264 ₃Measured from the edge of the barn, lagoon, or land application area to the nearest edge of the
5 setback feature6 ₄Existing at the time the first KPDES permit is issued7 ₅For existing operations, land application setbacks do not apply

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POULTRY SITING CRITERIA

SETBACK FEATURE ₃	POULTRY HOUSES, LITTER STORAGE, OR COMPOSTING SITE	LAND APPLICATION AREA
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		Injection	Other Method
Dwelling not owned by applicant, church, school, schoolyard, business, other structure to which the general public has access, park ⁴	1,500 feet	300 feet	300 feet
Incorporated city limit ^{4,5}	2,000 feet	1,000 feet	1,500 feet
Lake, river, blue-line stream, karst feature	150 feet	75 feet	75 feet
Water well not owned by applicant ⁴	300 feet	200 feet	200 feet
Downstream ¹ water listed in 401 KAR 5:030 as exceptional water or outstanding national resource water; or outstanding state resource water ²	1 mile	500 feet	500 feet
Downstream ¹ public water supply surface water intake	1 mile	500 feet	500 feet
Roadways, primary (state and Federal)	150 feet	75 feet	75 feet
Roadways, secondary (county)	100 feet	75 feet	75 feet

1 ¹Measured along gradient

2 ²Designated outstanding state resource waters are listed in 401 KAR 5:026

3 ³Measured from the edge of the barn, lagoon, or land application area to the nearest edge of the
4 setback feature

5 ⁴Existing at the time the first KPDES permit is issued

6 ⁵For existing operations, land application setbacks do not apply

7 **SWINE SITING CRITERIA**

SETBACK FEATURE ³	BARN, LAGOON	LAND APPLICATION AREA
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		Injection	Other Method
Dwelling not owned by applicant, church, school, schoolyard, business, other structure to which the general public has access, park ₄	1,500 feet	500 feet	1,000 feet
Incorporated city limit _{4,5}	3,000 feet	1,000 feet	2,000 feet
Lake, river, blue-line stream, karst feature	150 feet	75 feet	150 feet
Water well not owned by applicant ₄	300 feet	150 feet	150 feet
Downstream ₁ water listed in 401 KAR 5:030 as exceptional water or outstanding national resource water; or outstanding state resource water ₂	1 mile	750 feet	1,500 feet
Downstream ₁ public water supply surface water intake	5 miles	1 mile	1 mile
Roadways, primary (state and Federal)	150 feet	75 feet	150 feet
Roadways, secondary (county)	150 feet	75 feet	150 feet

1 ₁Measured along gradient

2 ₂Designated outstanding state resource waters are listed in 401 KAR 5:026

3 ₃Measured from the edge of the barn, lagoon, or land application area to the nearest edge of the
4 setback feature

5 ₄Existing at the time the first KPDES permit is issued

6 ₅For existing operations, land application setbacks do not apply

7 (d) The cabinet may grant a variance from the setbacks in this section for a dwelling not
8 owned by the applicant, or church if the applicant obtains from the owner of the property in
9 question an easement, properly filed of record, granting the applicant a permanent exemption
10 from the distance requirements in this administrative regulation. A certified copy of this
11 easement shall be submitted to the cabinet with the permit application.

- 1 Section 4. Permanent Litter Storage. Poultry concentrated animal feeding operations shall
- 2 provide permanent litter storage structures.

JAMES E. BICKFORD, Secretary
Natural Resources and Environmental Protection Cabinet

Date

APPROVED AS TO FORM:

BARBARA A. FOSTER, General Counsel
Office of Legal Services
Natural Resources and Environmental Protection Cabinet

Date

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REGULATORY IMPACT ANALYSIS

Administrative Regulation #: 401 KAR 5:072E

Contact person: Jack A. Wilson

(1) Type and number of entities affected:

This administrative regulation applies only to Concentrated Animal Feeding Operations as defined in 401 KAR 5:002.

(2) Direct and indirect costs or savings on the:

(a) Cost of living and employment in the geographical area in which the administrative regulation will be implemented, to the extent available from the public comments received.

Since this is an emergency regulation, there have been no public comments received.

(b) Cost of doing business in the geographical area in which the administrative regulation will be implemented, to the extent available from the public comments received.

Since this is an emergency regulation, there have been no public comments received.

(c) To the extent available from the public comments received, compliance, reporting, and paperwork requirements, including factors increasing or decreasing costs (note any effects upon competition) for the:

1. First year following implementation:

Since this is an emergency regulation, there have been no public comments received.

2. Second and subsequent years:

Since this is an emergency regulation, there have been no public comments received.

(3) Effects on the promulgating administrative body:

(a) Direct and indirect costs or savings:

1. First year:

There will be an increase in costs if there is a significant increase in the number of permit applications.

2. Continuing costs or savings:

There will be an increase in costs if there is a significant increase in the number of permit applications.

3. Additional factors increasing or decreasing costs:

There are no foreseen factors increasing or decreasing costs at this time.

(b) Reporting and paperwork requirements:

There will be an increased burden on the administrative body if there is a consequent increase in permit applications.

(4) Assessment of anticipated effect on state and local revenues:

There is no anticipated effect on state and local revenues.

(5) Source of revenue to be used for implementation and enforcement of administrative regulation:

The funds to support the implementation and enforcement of this administrative regulation will come from federal sources (Clean Water Act Section 106 funds).

(6) To the extent available from the public comments received, economic impact, including effects of economic activities arising from administrative regulation, on:

(a) Geographical area in which administrative regulation will be implemented:

Since this is an emergency regulation, there have been no public comments received.

(b) Kentucky:

Since this is an emergency regulation, there have been no public comments received.

(7) Assessment of alternative methods; reasons why alternatives were rejected:

This administrative regulation is in response to the U.S. Department of Agriculture, U.S. Environmental Protection Agency Unified National Strategy for Animal Feeding Operations, March 9, 1999. The federal strategy says that states should address integrator liability. Siting criteria are necessary for developing the comprehensive nutrient management plan. The U.S. Department of Agriculture, U.S. Environmental Protection Agency Unified National Strategy for Animal Feeding Operations, March 9, 1999, directs that odor and environmental matters be addressed by the states. This administrative regulation addresses these areas that are void in current state regulation. Other alternatives include doing nothing; voluntary measures; local planning and zoning, etc. Voluntary measures and local planning and zoning are still viable options for other governmental agencies.

(8) Assessment of expected benefits:

(a) Identify effects on public health and environmental welfare of the geographical area in which implemented and on Kentucky:

This administrative regulation is intended to protect public health and the environment.

(b) State whether detrimental effect on environment and public health would result if not implemented:

There would be a detrimental effect on the environment and public health if this administrative regulation is not implemented.

(c) If detrimental effect would result, explain detrimental effect:

The 1998 305(b) "Report to Congress on Water Quality" has identified agriculture and concentrated animal feeding operation/AFOs as contributors to the impairment of streams in Kentucky. This administrative regulation, with its siting criteria, minimizes this potential impairment and loss of designated uses. The integrator liability provisions of this administrative regulation seek to ensure the proper mitigation or clean up of a spill or accident by ensuring that sufficient funds are available.

(9) Identify any statute, administrative regulation or government policy which may be in conflict, overlapping, or duplication:

This administrative regulation may overlap with 401 KAR 5:009, which expires at the adjournment of the 2000 legislative session.

(a) Necessity of proposed administrative regulation if in conflict:

This administrative regulation is in response to the U.S. Department of Agriculture, U.S. Environmental Protection Agency Unified National Strategy for Animal Feeding Operations. The U.S. Department of Agriculture, U.S. Environmental Protection Agency Unified National Strategy for Animal Feeding Operations directs that odor and environmental matters be addressed by the states. Unlike 401 KAR 5:009, the federal strategy also addresses animals other than swine. This administrative regulation, by addressing integrator liability, siting criteria, and broader categories of animals, seeks to be consistent with the federal strategy.

(b) If in conflict, was effort made to harmonize the proposed administrative regulation with conflicting provisions:

No, however, 401 KAR 5:009 expires at the adjournment of the 2000 legislative session. The overlap is expected to be minimal.

(10) Any additional information or comments:

No.

(11) TIERING: Is tiering applied? Yes X No

(Explain why tiering was or was not applied)

Due to the definitions of Concentrated Animal Feeding Operations, smaller producers who are thought to have less of an impact on public health and the environment are not affected by this emergency regulation, unless they expand their operation to the size of a concentrated animal feeding operation.

FEDERAL MANDATE ANALYSIS COMPARISON

Administrative Regulation #: 401 KAR 5:072E

Contact person: Jack A. Wilson

- 1. Federal statute or regulation constituting the federal mandate.** 33 U.S.C. 1342.
- 2. State compliance standards.** KRS 224.10-100, 224.16-050, 224.20-110, 224.70-110.
- 3. Minimum or uniform standards contained in the federal mandate.** The Unified National Strategy presents USDA and EPA's plan for addressing the water quality and public health impacts associated with animal feeding operations.
- 4. Will this administrative regulation impose stricter requirements, or additional or different responsibilities or requirements than those required by the federal mandate?**
No, based on the U.S. Department of Agriculture, U.S. Environmental Protection Agency Unified National Strategy for Animal Feeding Operations, March 9, 1999.
- 5. Justification for the imposition of the stricter standard, or additional or different responsibilities or requirements.** Not Applicable.

FISCAL NOTE ON LOCAL GOVERNMENT

Administrative Regulation #: 401KAR 5:072E

Contact person: Jack A. Wilson

New ☒ Amendment ☐

1. Does this administrative regulation relate to any aspect of a local government, including any service provided by that local government?

Yes ☐ No ☒

2. State what unit, part or division of local government this administrative regulation will affect.

This administrative regulation will not affect any unit, part, or division of local government.

3. State the aspect or service of local government to which this administrative regulation relates.

This administrative regulation does not relate to local government.

4. Estimate the effect of this administrative regulation on the expenditures and revenues of a local government for the first full year the administrative regulation is to be in effect. If specific dollar estimates cannot be determined, provide a brief narrative to explain the fiscal impact of the administrative regulation.

Revenues (+/-): There is no anticipated effect on current revenues.

Expenditures (+/-): There is no anticipated effect on current revenues.

Other Explanation: None.